

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REGINA A. HERNANDEZ

Claimant

VS.

STATE OF KANSAS

Self-Insured Respondent

Docket No. 1,039,320

ORDER

STATEMENT OF THE CASE

Respondent requested review of the July 12, 2010, Order entered by Administrative Law Judge Brad E. Avery. Frank D. Taff, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that respondent was self insured and employed its own attorney and that service of the Demand for Payment on respondent's attorney satisfied the requirements of K.S.A. 44-512a(a). Respondent was ordered to pay claimant the amount of \$350 in penalties.

ISSUES

Respondent asserts that claimant did not satisfy the requirements of K.S.A. 44-512a(a) when her attorney served a Demand for Payment by delivering a copy to a receptionist for the Kansas Health Policy Authority. Accordingly, respondent asks that the Board reverse the ALJ's Order requiring it to pay claimant penalties in the amount of \$350. In the event the Board finds that claimant is entitled to penalties in this matter, respondent requests that the penalty be decreased from \$350 to \$175. Further, respondent argues the ALJ did not decide claimant's request for attorney fees, so the Board has no jurisdiction over that issue.

Claimant contends service of the Demand for Payment was proper and she is entitled to penalties. Claimant further asks that the Board increase the amount of the penalties from \$350 to \$700. Last, claimant asks for attorney's fees for 3 hours at \$175 per hour.

The issues for the Board's review are:

- (1) Did claimant's service of her Demand for Payment satisfy the requirements of K.S.A. 44-512a(a)?
- (2) If the Board finds claimant is entitled to penalties, what is an appropriate amount of penalties to be assessed?
- (3) Is claimant's attorney entitled to attorney's fees?

FINDINGS OF FACT

Claimant is an employee of the State of Kansas. On June 6, 2007, the date of accident, she was working for the legal section of the Kansas Department of Administration.¹

The ALJ entered an Award in this matter on May 4, 2010, finding that claimant had a 15 percent permanent partial impairment to the right upper extremity at the level of the shoulder. The ALJ found that respondent should pay claimant 7.29 weeks of temporary total disability compensation at the rate of \$333.88 in the amount of \$2,433.99 and permanent partial disability compensation in the amount of \$10,904.52, for a total award of \$13,338.51. The Award was due and owing and ordered paid in one lump sum, minus any amounts previously paid.

As of May 19, 2010, permanent partial disability compensation in the amount of \$10,904.52 had not been paid to claimant, and claimant's attorney hand delivered a Demand for Payment to the Health Policy Authority. The Demand for Payment was date-stamped received by the person at the front desk of the Health Policy Authority. When no payment was forthcoming, claimant filed a Motion for Civil Penalties on June 9, 2010, asking for assessment of a civil penalty of \$100 per week each and every week from May 4, 2010, until all amounts are paid in full.

At the penalties hearing held July 9, 2010, respondent's attorney stated that he was on vacation on May 4, 2010, the day the Award was entered. When he returned on May 10, 2010, a check in the amount of \$10,904.52 was ordered payable to claimant and her attorney. When respondent's attorney received the Demand for Payment on May 19, 2010, he checked and found that the check had been ordered, and no response was made to the demand. Later, when claimant's Motion for Civil Penalties was filed, respondent's attorney checked the computer records and found that somehow the check payable to claimant and her attorney had been voided, either because of human error, computer error, or a combination of both. Respondent's attorney ordered that the check be re-issued,

¹ R.H. Trans. at 6.

which was done on June 17, 2010. On that same date, respondent's attorney sent claimant's attorney an email explaining the mistake and advising the check should be in his hands in about a week. Claimant's attorney received the check in his office on June 23, 2010.

At the penalties hearing, respondent's attorney argued that K.S.A. 44-512a(a) states that before any penalty can be assessed, proper service of the demand must be made. Respondent's attorney argued that service by hand delivery to an unknown employee of the Kansas Health Policy Authority did not constitute proper service of the demand, as neither he personally nor the State Self Insurance Fund was served with a copy of the Demand for Payment.

Respondent's attorney also argued at the penalties hearing that the penalties statute is meant to deter "bad actors and bad acting"² and because respondent attempted to honor its obligations and tried to fix the problem when it was discovered, any penalties assessed should be minimal. Claimant's attorney argued that in this situation, a penalty of \$100 per week should be entered against respondent.

PRINCIPLES OF LAW

K.S.A. 44-512a states in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical

²Penalties Hearing Trans. at 9.

compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

ANALYSIS

The above-quoted statute requires service of a written demand to be made personally or by regular mail on the employer or insurance carrier and its attorney of record. Claimant's attorney said he hand delivered the demand to Mr. Benedict's receptionist and that this complied with the statute's requirements for service.

MR. TAFF [Claimant's attorney]: Well, I dispute all that, Judge. The only way this could be stamped received is if I hand-delivered, which I most certainly did.

JUDGE AVERY: Are you proffering that you did hand-deliver it?

MR. TAFF: Yes, I hand-delivered it and it was stamped by the person at the front desk of this Health Policy Authority.

....

MR. TAFF: It was hand-delivered to the person who sets [sic] at the front desk of this Health Policy Authority, which is the person who serves Mr. Benedict because I've been in his office. I pass right by this person. I know where Mr. Benedict sits. This person is the one who receives such correspondence, anything served on its agency and that's how it got stamped and that's why it is stamped.³

The ALJ held:

Penalties ordered paid by the self insured respondent in the amount of \$350.00. Service of demand was proper. Employer is self insured and employs its own attorney. Service on Mr. Benedict represents service required by K.S.A. 44-512a(a).⁴

Mr. Benedict admits that he received claimant's demand.

Counsel for the respondent did receive the demand, but attached no especial significance to the it, [sic] as it is common practice for many claimant counsel to issue such demands regardless of whether a controversy exists, and because payment records indicated a warrant had been issued for the amount due.⁵

³ Penalties Hearing Trans. at 10-12.

⁴ ALJ Order (July 12, 2010)

⁵ Respondent's Brief at 1 (filed July 28, 2010).

We received Mr. Taff's demand around May 19th—actually I believe we received it on May 19. This appeared to be nothing more than just the regular demand for compensation that many claimant counsel send out as a matter of course. When I looked at Mr. Taff's demand and I found out that the check had already been ordered it was apparent that there was nothing further that needed to be done, so nothing further was done.⁶

The Board finds that claimant satisfied the requirement for service on respondent's attorney.

Respondent also denies that claimant served the employer or insurance carrier. First, it should be emphasized that the State of Kansas is self-insured for purposes of workers compensation.

K.S.A. 2009 Supp. 44-575 states in part:

(a) As used in K.S.A. 44-575 through 44-580, and amendments thereto, "state agency" means the state, or any department or agency of the state, but not including the Kansas turnpike authority, the university of Kansas hospital authority, any political subdivision of the state or the district court with regard to district court officers or employees whose total salary is payable by counties.

(b) For the purposes of providing for the payment of compensation for claims arising on and after July 1, 1974, and all other amounts required to be paid by any state agency as a self-insured employer under the workers compensation act and any amendments or additions thereto, there is hereby established the state workers compensation self-insurance fund in the state treasury. The name of the state workmen's compensation self-insurance fund is hereby changed to the state workers compensation self-insurance fund. Whenever the state workmen's compensation self-insurance fund is referred to or designated by any statute, contract or other document, such reference or designation shall be deemed to apply to the state workers compensation self-insurance fund.

....
(d) The secretary of administration shall administer the state workers compensation self-insurance fund and all payments from such fund shall be upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the secretary of administration or a person or persons designated by the secretary.

Mr. Benedict is a full-time employee of the State of Kansas. Nevertheless, he denies that service upon him constitutes service upon the State of Kansas, the Department of Administration, or the State Self Insurance Fund.

⁶ Penalty Hearing Trans. at 7-8 (statement by respondent's attorney).

MR. BENEDICT [Respondent's attorney]: The Kansas Health Policy Authority is not the employer of Ms. Hernandez. The Kansas Health Policy Authority is not the insurer. The insurer would be the State Self-Insurance Fund. Mr. Taff did not do what he was supposed to do.

JUDGE AVERY: You're representing the State Self-Insurance Fund, correct, in this case?

MR. BENEDICT: I did. The statute does not say—⁷

Respondent objects to the misrepresentation of claimant counsel in his letter brief that the State Self Insurance Fund is the employer of the undersigned. I am employed within the Legal section of, and by, the Kansas Health Policy Authority; the State Self Insurance Fund is my client.⁸

At the penalties hearing, Mr. Benedict introduced himself as counsel for the State of Kansas. "The State of Kansas appears personally through counsel, Bryce Benedict."⁹ K.S.A. 2009 Supp. 44-577(a) requires that the state workers compensation self insurance fund be represented by the "chief attorney for the department of administration, or another attorney of the department of administration designated by the chief attorney" Claimant was an employee of the State of Kansas and specifically the Department of Administration. Mr. Benedict is representing the State of Kansas, the Department of Administration, and the State Self Insurance Fund. The State Self Insurance Fund can only be represented by the Chief Attorney of the Department of Administration or another attorney of the Department of Administration. The Board finds that service on an attorney employed full time by the Department of Administration constitutes service on the claimant's employer for purposes of K.S.A. 44-512a.

The Board further finds the amount of the penalty assessed by the ALJ is reasonable and appropriate.

K.S.A. 44-536(g) permits an award of attorney fees for services rendered a claimant post award. That request, however, must first be presented to the ALJ.

CONCLUSION

(1) Claimant's service of her Demand for Payment satisfied the requirements of K.S.A. 44-512a(a).

(2) Claimant is entitled to penalties in the amount of \$350.

⁷ Penalty Hearing Trans. at 12.

⁸ Respondent Reply Brief at 1 (filed Aug. 2, 2010).

⁹ Penalty Hearing Trans. at 3.

(3) Claimant must submit her request for attorney fees to the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated July 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge